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9 **BEFORE THE**
10 **BOARD OF REGISTERED NURSING**
11 **DEPARTMENT OF CONSUMER AFFAIRS**
STATE OF CALIFORNIA

12 In the Matter of the Accusation Against:

Case No. 2009-118

13 KIMBERLY JEANNE WINTER
5950B Mission Center Road
14 San Diego, CA 92123

A C C U S A T I O N

15 Registered Nurse License No. 601747

16 Respondent.

17
18 Complainant alleges:

19 **PARTIES**

20 1. Ruth Ann Terry, M.P.H., R.N. (Complainant) brings this Accusation
21 solely in her official capacity as the Executive Officer of the Board of Registered Nursing,
22 Department of Consumer Affairs.

23 2. On or about July 9, 2002, the Board of Registered Nursing issued
24 Registered Nurse License Number 601747 to Kimberly Jeanne Winter (Respondent). The
25 Registered Nurse License expired on November 30, 2007, and has not been renewed.

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1 duties of the licensee in question, the record of conviction of the crime shall be
2 conclusive evidence of the fact that the conviction occurred, but only of that fact,
3 and the board may inquire into the circumstances surrounding the commission of
4 the crime in order to fix the degree of discipline or to determine if the conviction
5 is substantially related to the qualifications, functions, and duties of the licensee in
6 question.

7 As used in this section, "license" includes "certificate," "permit,"
8 "authority," and "registration."

9 9. Section 2761 of the Code states:

10 The board may take disciplinary action against a certified or licensed nurse
11 or deny an application for a certificate or license for any of the following:

12 (a) Unprofessional conduct, which includes, but is not limited to, the
13 following:

14 (1) Incompetence, or gross negligence in carrying out usual
15 certified or licensed nursing functions.

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17 (f) Conviction of a felony or of any offense substantially related to the
18 qualifications, functions, and duties of a registered nurse, in which event the
19 record of the conviction shall be conclusive evidence thereof.

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21 10. Section 2762 of the Code states:

22 In addition to other acts constituting unprofessional conduct within the
23 meaning of this chapter [the Nursing Practice Act], it is unprofessional conduct
24 for a person licensed under this chapter to do any of the following:

25 (a) Obtain or possess in violation of law, or prescribe, or except as
26 directed by a licensed physician and surgeon, dentist, or podiatrist administer to
27 himself or herself, or furnish or administer to another, any controlled substance as
28 defined in Division 10 (commencing with Section 11000) of the Health and Safety
Code or any dangerous drug or dangerous device as defined in Section 4022.

(b) Use any controlled substance as defined in Division 10 (commencing
with Section 11000) of the Health and Safety Code, or any dangerous drug or
dangerous device as defined in Section 4022, or alcoholic beverages, to an extent
or in a manner dangerous or injurious to himself or herself, any other person, or
the public or to the extent that such use impairs his or her ability to conduct with
safety to the public the practice authorized by his or her license.

(c) Be convicted of a criminal offense involving the prescription,
consumption, or self-administration of any of the substances described in
subdivisions (a) and (b) of this section, or the possession of, or falsification of a
record pertaining to, the substances described in subdivision (a) of this section, in
which event the record of the conviction is conclusive evidence thereof.

.....
(e) Falsify, or make grossly incorrect, grossly inconsistent, or unintelligible entries in any hospital, patient, or other record pertaining to the substances described in subdivision (a) of this section.

11. Section 4022 of the Code states:

"Dangerous drug" or "dangerous device" means any drug or device unsafe for self-use in humans or animals, and includes the following:

(a) Any drug that bears the legend: "Caution: federal law prohibits dispensing without prescription," "Rx only," or words of similar import.

(b) Any device that bears the statement: "Caution: federal law restricts this device to sale by or on the order of a _____," "Rx only," or words of similar import, the blank to be filled in with the designation of the practitioner licensed to use or order use of the device.

(c) Any other drug or device that by federal or state law can be lawfully dispensed only on prescription or furnished pursuant to Section 4006.

12. Section 4059 of the Code states, in pertinent part, that a person may not furnish any dangerous drug except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7. A person may not furnish any dangerous device, except upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7.

13. Section 4060 of the Code states:

No person shall possess any controlled substance, except that furnished to a person upon the prescription of a physician, dentist, podiatrist, optometrist, veterinarian, or naturopathic doctor pursuant to Section 3640.7, or furnished pursuant to a drug order issued by a certified nurse-midwife pursuant to Section 2746.51, a nurse practitioner pursuant to Section 2836.1, or a physician assistant pursuant to Section 3502.1, or naturopathic doctor pursuant to Section 3640.5, or a pharmacist pursuant to either subparagraph (D) of paragraph (4) of, or clause (iv) of subparagraph (A) of paragraph (5) of, subdivision (a) of Section 4052. This section shall not apply to the possession of any controlled substance by a manufacturer, wholesaler, pharmacy, pharmacist, physician, podiatrist, dentist, optometrist, veterinarian, naturopathic doctor, certified nurse-midwife, nurse practitioner, or physician assistant, when in stock in containers correctly labeled with the name and address of the supplier or producer.

.....
14. California Code of Regulations, title 16, section 1442, states:

As used in Section 2761 of the code, "gross negligence" includes an extreme departure from the standard of care which, under similar circumstances, would have ordinarily been exercised by a competent registered nurse. Such an

1 extreme departure means the repeated failure to provide nursing care as required
2 or failure to provide care or to exercise ordinary precaution in a single situation
3 which the nurse knew, or should have known, could have jeopardized the client's
4 health or life.

5 15. California Code of Regulations, title 16, section 1443, states:

6 As used in Section 2761 of the code, "incompetence" means the lack of
7 possession of or the failure to exercise that degree of learning, skill, care and
8 experience ordinarily possessed and exercised by a competent registered nurse as
9 described in Section 1443.5.

10 16. California Code of Regulations, title 16, section 1444, states:

11 A conviction or act shall be considered to be substantially related to the
12 qualifications, functions or duties of a registered nurse if to a substantial degree it
13 evidences the present or potential unfitness of a registered nurse to practice in a
14 manner consistent with the public health, safety, or welfare. Such convictions or
15 acts shall include but not be limited to the following:

16 (a) Assaultive or abusive conduct including, but not limited to, those
17 violations listed in subdivision (d) of Penal Code Section 11160.

18 (b) Failure to comply with any mandatory reporting requirements.

19 (c) Theft, dishonesty, fraud, or deceit.

20 (d) Any conviction or act subject to an order of registration pursuant to
21 Section 290 of the Penal Code.

22 17. California Code of Regulations, Title 16, section 1445 states:

23

24 (b) When considering the suspension or revocation of a license on the
25 grounds that a registered nurse has been convicted of a crime, the board, in
26 evaluating the rehabilitation of such person and his/her eligibility for a license will
27 consider the following criteria:

28 (1) Nature and severity of the act(s) or offense(s).

(2) Total criminal record.

(3) The time that has elapsed since commission of the act(s) or offense(s).

(4) Whether the licensee has complied with any terms of parole, probation,
restitution or any other sanctions lawfully imposed against the licensee.

(5) If applicable, evidence of expungement proceedings pursuant to
Section 1203.4 of the Penal Code.

(6) Evidence, if any, of rehabilitation submitted by the licensee.

18. Section 125.3 of the Code provides, in pertinent part, that the Board may request the administrative law judge to direct a licensee found to have committed a violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case.

DRUGS

19. Ativan, the brand name for lorazepam, is a Schedule IV controlled substance as designated by Health and Safety Code section 11057, subdivision (d)(16), and is a dangerous drug pursuant to Business and Professions Code section 4022.

20. Dilaudid, a brand name for hydromorphone, is a Schedule II controlled substance as designated by Health and Safety Code Section 11055, subdivision (b)(1)(K) and is a dangerous drug pursuant to Business and Professions Code section 4022.

21. Morphine is a Schedule II controlled substance as designated by Health and Safety Code section 11055, subdivision (b)(1)(M), and is a dangerous drug pursuant to Business and Professions Code section 4022.

22. Cocaine is a Schedule II controlled substance as designated by Health and Safety Code section 11055, subdivision (b)(6), and is a dangerous drug pursuant to Business & Professions Code section 4022.

FIRST CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Falsification of Patient and/or Hospital Records)

23. Respondent has subjected her license to disciplinary action under section 2762, subdivision (e) of the Code in that on or about November 26, 2004, while on duty as a registered nurse at Mission Hospital in Mission Viejo, California, Respondent falsified or made grossly incorrect, inconsistent, or unintelligible entries in hospital and patient records, as follows:

Patient MR

a. On November 26, 2004, at 0943 hours, Respondent withdrew 2 mg of Ativan from the Pyxis System for this patient; however, Respondent failed to record the administration or wastage of any portion of the Ativan in the patient's chart or any hospital record, or otherwise account for the disposition of the drug.

1 b. On November 26, 2004, at 1041 hours, Respondent withdrew 2 mg of
2 morphine from the Pyxis System when there was no physician's order for morphine for this
3 patient. Respondent failed to record the wastage of any portion of the morphine in the patient's
4 chart or any hospital record, or otherwise account for the disposition of the drug.

5 c. On November 26, 2004, at 1042 hours, Respondent withdrew 2 mg of
6 Ativan from the Pyxis System for this patient; however, Respondent failed to record the
7 administration or wastage of any portion of the Ativan in the patient's chart or any hospital
8 record, or otherwise account for the disposition of the drug.

9 d. On November 26, 2004, at 1054 hours, Respondent withdrew 2 mg of
10 Ativan from the Pyxis System for this patient. Respondent recorded the wastage of 1.75 mg of
11 Ativan; however, she failed to account for the remaining .25 mg of Ativan in the patient's chart
12 or any hospital record, or otherwise account for the disposition of the drug.

13 e. On November 26, 2004, at 1054 hours, Respondent withdrew 2 mg of
14 Ativan from the Pyxis System for this patient. Respondent recorded the wastage of 1.75 mg of
15 Ativan; however, she failed to account for the remaining .25 mg of Ativan in the patient's chart
16 or any hospital record.

17 f. On November 26, 2004, at 1459 hours, Respondent withdrew 2 mg of
18 morphine from the Pyxis System when there was no physician's order for morphine for this
19 patient. Respondent failed to record the wastage of any portion of the morphine in the patient's
20 chart or any hospital record, or otherwise account for the disposition of the drug.

21 g. On November 26, 2004, at 1756 hours, Respondent withdrew 2 mg of
22 morphine from the Pyxis System when there was no physician's order for morphine for this
23 patient. Respondent failed to record the wastage of any portion of the morphine in the patient's
24 chart or any hospital record or otherwise account for the disposition of the drug.

25 h. On November 26, 2004, at 1756 hours, Respondent withdrew 2 mg of
26 Ativan from the Pyxis System for this patient; however, Respondent failed to record the
27 administration or wastage of any portion of the Ativan in the patient's chart or any hospital
28 record, or otherwise account for the disposition of the drug.

1 i. On November 26, 2004, at 1828 hours, Respondent withdrew 2 mg of
2 Ativan from the Pyxis System for this patient. Respondent recorded the wastage of 1.8 mg of
3 Ativan; however, she failed to account for the remaining .20 mg of Ativan in the patient's chart
4 or any hospital record.

5 **Patient MW**

6 j. On November 26, 2004, at 0809 hours, Respondent withdrew 1 mg of
7 Dilaudid from the Pyxis System for this patient; however, Respondent failed to record the
8 administration or wastage of any portion of the Dilaudid in the patient's chart or any hospital
9 record, or otherwise account for the disposition of the drug.

10 k. On November 26, 2004, at 1104 hours, Respondent withdrew 1 mg of
11 Dilaudid from the Pyxis System for this patient; however, Respondent failed to record the
12 administration or wastage of any portion of the Dilaudid in the patient's chart or any hospital
13 record, or otherwise account for the disposition of the drug.

14 l. On November 26, 2004, at 1459 hours, Respondent withdrew 1 mg of
15 Dilaudid from the Pyxis System for this patient; however, Respondent failed to record the
16 administration or wastage of any portion of the Dilaudid in the patient's chart or any hospital
17 record, or otherwise account for the disposition of the drug.

18 m. On November 26, 2004, at 1630 hours, Respondent withdrew 1 mg of
19 Dilaudid from the Pyxis System for this patient; however, Respondent failed to record the
20 administration or wastage of any portion of the Dilaudid in the patient's chart or any hospital
21 record, or otherwise account for the disposition of the drug.

22 n. On November 26, 2004, at 1632 hours, Respondent withdrew 1 mg of
23 Dilaudid from the Pyxis System for this patient; however, Respondent failed to record the
24 administration or wastage of any portion of the Dilaudid in the patient's chart or any hospital
25 record, or otherwise account for the disposition of the drug.

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SECOND CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Obtaining Controlled Substances in Violation of the Law)

24. Respondent has subjected her license to disciplinary action under sections 2762, subdivision (a) and 4059 of the Code in that on or about November 26, 2004, Respondent obtained in violation of the law the controlled substances Ativan, Dilaudid, and morphine, by removing the drugs from the hospital's Pyxis System, which constitutes unprofessional conduct, as detailed in paragraph 23, above.

THIRD CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Gross Negligence)

25. Respondent has subjected her license to disciplinary action under section 2761, subdivision (a)(1) of the Code in that on or about November 26, 2004, while on duty as a registered nurse at a Mission Viejo hospital, Respondent committed acts of gross negligence in carrying out her nursing duties, as defined in California Code of Regulations, section 1442, which constitutes unprofessional conduct, as detailed in paragraph 23, above.

FOURTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Incompetence)

26. Respondent has subjected her license to disciplinary action under section 2761, subdivision (a)(1) of the Code in that on or about November 26, 2004, while on duty as a registered nurse at a Mission Viejo hospital, Respondent committed acts constituting incompetence, as defined in California Code of Regulations, section 1442, which constitutes unprofessional conduct, as detailed in paragraph 23, above.

FIFTH CAUSE FOR DISCIPLINE

(Unprofessional Conduct - Use of a Controlled Substance)

27. Respondent has subjected her license to disciplinary action under section 2762, subdivisions (a) and (b), in that Respondent used cocaine, a controlled substance. The circumstances were that on or about January 28, 2005, Respondent reported to LabCorp, a biological testing company in San Diego, to provide a urine sample for a pre-employment drug screen with PPR Travel, a traveling nurse registry. On or about January 31 2005, LabCorp

1 provided the results of the drug screen to PPR Travel; Respondent's urine sample tested positive
2 for cocaine. Following a review of the test results, a medical review officer determined that the
3 sample provided by Respondent tested positive for cocaine.

4 SIXTH CAUSE FOR DISCIPLINE

5 (May 16, 2007 Criminal Conviction for DUI Drugs on November 4, 2006)

6 28. Respondent has subjected her license to disciplinary action under sections
7 490 and 2761, subdivision (f) of the Code in that Respondent was convicted of a crime that is
8 substantially related to the qualifications, functions, and duties of a registered nurse. The
9 circumstances are as follows:

10 a. On or about May 16, 2007, in a criminal proceeding entitled
11 *People of the State of California v. Kimberly J. Winter*, in San Diego County Superior Court,
12 case number S208432, Respondent was convicted on her plea of guilty of violating Vehicle Code
13 section 23152, subdivision (a), driving under the influence of drugs, a misdemeanor.

14 b. As a result of the conviction, on or about May 16, 2007,
15 Respondent was sentenced to five years summary probation and payment of fees and fines in the
16 amount of \$1,756. Respondent was ordered to attend and complete a three-month First
17 Conviction Program and a MADD program.

18 c. The facts that led to the conviction were that on or about the
19 evening of November 4, 2006, a California Highway Patrol (CHP) officer was summoned to the
20 San Ysidro/Mexico Port of Entry by a U.S. Customs agent to evaluate Respondent for driving
21 under the influence. Respondent was alone in her vehicle, driving from Mexico into the United
22 States. She was asked to open the trunk of her car by the Customs agent, and staggered to the
23 back of her car. The CHP officer interviewed Respondent in a holding cell. The officer noted
24 that Respondent's eyes were roaming and she would not make eye contact. Respondent appeared
25 to fall asleep several times during the questioning. Respondent's speech was thick, slow, and
26 slurred. At one point, Respondent stood up and stumbled towards the door of the holding cell;
27 she stated she needed to use the restroom. The CHP officer noted that Respondent had urine-
28 soaked pants. The officer administered a series of field sobriety tests, none of which Respondent

1 completed successfully. Respondent told the officer that earlier in the day she had ingested
2 prescription medications. Further, Respondent's California driver's license was
3 suspended/revoked for a prior failure to appear. Respondent provided a sample of her blood for
4 testing. Based on the Customs agent's observations of Respondent's driving, her objective
5 symptoms of intoxication, Respondent's admission that she had taken prescription medications,
6 and her failure to perform the field sobriety tests, the officer arrested Respondent for driving
7 under the influence of drugs.

8 **SEVENTH CAUSE FOR DISCIPLINE**

9 **(Unprofessional Conduct - Use of Drugs in a Dangerous Manner)**

10 29. Respondent has subjected her license to disciplinary action under sections
11 2761, subdivision (a), and 2762, subdivision (b) of the Code in that on November 4, 2006, as
12 detailed in paragraph 28, above, Respondent used prescription drugs to an extent or in a manner
13 dangerous or injurious to herself and the public, which constitutes unprofessional conduct.

14 **EIGHTH CAUSE FOR DISCIPLINE**

15 **(Unprofessional Conduct - Conviction of a Drug-Related Criminal Offense)**

16 30. Respondent has subjected her license to disciplinary action under sections
17 2761, subdivision (a), and 2762, subdivision (c) of the Code in that on or about May 16, 2007, as
18 detailed in paragraph 28, above Respondent was convicted of a criminal offense involving the
19 consumption and self-administration of prescription drugs, which constitutes unprofessional
20 conduct.

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1 PRAYER

2 WHEREFORE, Complainant requests that a hearing be held on the matters herein
3 alleged, and that following the hearing, the Board of Registered Nursing issue a decision:

- 4 1. Revoking or suspending Registered Nurse License Number 601747, issued
5 to Kimberly Jeanne Winter;
- 6 2. Ordering Kimberly Jeanne Winter to pay the Board of Registered Nursing
7 the reasonable costs of the investigation and enforcement of this case, pursuant to Business and
8 Professions Code section 125.3;
- 9 3. Taking such other and further action as deemed necessary and proper.

10
11 DATED: 11/26/08

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13 
14 RUTH ANN TERRY, M.P.H., R.N.
15 Executive Officer
16 Board of Registered Nursing
17 Department of Consumer Affairs
18 State of California
19 Complainant

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